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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1264

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

J. H. NOBLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered February 11, 1947, affirming the judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the District Court (R. 34–37, 40–41) is reported in 66 F. Supp. 258. The judgment of the Circuit Court of Appeals (R. 46) has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 11, 1947. (R. 46.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether claims for refund of income taxes must be filed within two years after the payment of the tax, as provided by Section 322 (b) of the Internal Revenue Code, or within four years after the payment of the tax, as provided by Section 3313 of the Code.

STATUTES AND REGULATIONS INVOLVED

The provisions of the statutes and regulations are set forth in our petition in *Jones* v. *Liberty Glass Co.*, which is being filed simultaneously with the petition herein.[1] Section 322 (a) and (b) of

[1] The tax here involved is income tax for the taxable year 1935. Income taxes for taxable years beginning prior to January 1, 1939, remain subject to the statutory provisions in effect prior to the Code. Section 1 of the Internal Revenue Code (26 U. S. C. 1). However, Section 322 (b) of the Revenue Act of 1934, and Section 3228 (a) of the Revised Statutes as it read in 1935 are the same as Section 322 (b) and Section 3313 of the Code, and there is no material difference in the statutory situation in effect in 1935 and under the Code so far as the argument here made is concerned. Moreover, the taxpayer relied upon Section 3313 of the Code in its claim for refund and has continued to rely upon it. In view of all this, it is believed confusion is avoided and ease of reference facilitated by discussing Section 322 (b) and Section 3313 of the Code as the statutes involved.

the Revenue Act of 1934, c. 277, 48 Stat. 680, is the same as Section 322 (a) and (b) of the Internal Revenue Code; Section 3228 (a) of the Revised Statutes as it read in 1935 is the same as Section 3313 of the Code; and Article 322–7 of Regulations 86, promulgated under the Revenue Act of 1934, is the same as Section 29.322–7 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

STATEMENT

The facts as stipulated (R. 16–27) were found by the District Court (R. 34–36) and may be summarized as follows:

On March 16, 1936, the taxpayer filed with the Collector a joint individual income tax return for himself and wife for the calendar year 1935, disclosing a tax liability of $8,017.01, which was duly paid. In the return losses and gains from sales of capital assets by taxpayer and his wife were reported together, the losses of the wife being deducted from the gains of the husband, resulting in the net loss in excess of $2,000, which amount (the allowable limit of losses) was deducted in the return. (R. 16, 17.)

On June 6, 1937, the taxpayer was advised in a conference hearing in the office of the Internal Revenue Agent in Charge at Detroit that there was additional income tax due for the year 1935 with interest due aggregating $421.80. The taxpayer gave to the Internal Revenue Agent in

Charge his check made payable to the Collector of Internal Revenue for the $421.80. The check was later returned to the taxpayer without having been delivered to the Collector. The taxpayer and his wife on June 7, 1937, executed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" providing for the immediate assessment of the deficiency $421.80. Such consent was never used by the Bureau of Internal Revenue. (R. 17.)

By letter dated June 11, 1937, George E. Neal, Internal Revenue Agent in Charge at Detroit, notified the taxpayer that instead of a deficiency of $421.80 on the 1935 income tax return there was a deficiency of $19,973.93 and the taxpayer was furnished a computation showing the basis of such determination. (R. 17–23.)

After protest and further conference, taxpayer's check for $421.80 was returned to him on July 14, 1937, and he gave the Internal Revenue Agent in Charge a new check for $21,527.70 payable to the Collector covering the then proposed deficiency assessment of tax of $19,973.93, plus interest computed thereon of $1,553.77. The check for $21,527.70 was received on July 21, 1937, by the Collector, who remitted it to the Treasury of the United States as a collection of internal revenue. (R. 23.)

On July 14, 1937, taxpayer and his wife executed another waiver agreement under which they

waived certain statutory restrictions in their favor and consented to the immediate assessment and collection against them of 1935 income tax in the principal sum of $19,973.93, plus deficiency interest of $1,553.77, which the Commissioner thereafter assessed. (R. 23–24.) The waiver agreement executed July 14, 1937, contained a printed footnote reading in part as follows (R. 24):

> The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 606 of the Revenue Act of 1928 and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.
>
> If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, * * *.

On January 28, 1941, the taxpayer and his wife filed a claim for refund of $21,105.90, plus interest, on the following ground (R. 24–25):

> The Internal Revenue Department refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband and wife, and made an extra assessment on July 11, 1937,

in the principal sum of $19,973.93 and interest in the sum of $1,553.77, which amounts were paid under protest on July 14, 1937. We claim this to be an illegal assessment and collection, and that it should be refunded to the claimants. United States Code Annotated, Title 26, Section 3313.

By registered mail the Commissioner of Internal Revenue on August 19, 1941, rejected the claim for refund of taxpayer and his wife. In that letter the Commissioner referred to an earlier communication sent to the taxpayer and his wife on April 25, 1941, which stated the following (R. 25):

> Claim filed January 28, 1941, for the refund of $19,973.93 additional tax and $1,553.77 interest paid July 21, 1937 on 1935 income tax return is rejected in accordance with Sec. 322 (b) (1) of the Revenue Act of 1934, which reads in part as follows:
>
> "Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later."
>
> Section 3313 of the Internal Revenue Code, referred to in the claim specifically excludes income taxes from the taxes for which a claim may be filed within four years after payment.

On July 12, 1941, the taxpayer transmitted to and filed with the Collector his individual claim for refund of $21,527.70 paid with respect to the year 1935. The claim was on the same grounds as a claim filed by taxpayer and his wife on January 28, 1941. This claim was returned to the taxpayer by the Collector with the request that the taxpayer's wife join in the execution of the claim, which request was refused and the claim was returned to the Collector on September 23, 1941, and on October 3, 1941, the Collector again returned the claim to the taxpayer. (R. 25–26.)

For the purpose of a breakdown of the deficiency collection of 1935 income tax and deficiency interest totalling $21,527.70 hereinbefore mentioned, (a) $21,105.90 thereof may be allocated to the Commissioner's adjustment increasing the reported income under the joint return by $45,049.45 under his ruling that losses sustained by taxpayer's wife from the sale of her capital assets could not be offset against gains derived by the taxpayer from the sale of his capital assets during the taxable years; and (b) the balance of the payments consisting of tax deficiency and interest thereon paid to the extent of $421.80 may be allocated to certain other adjustments made by the Commissioner to the returned income for the year 1935, the propriety of which is not in question in this proceeding. (R. 26.)

This action was commenced on July 10, 1943. (R. 27.) Both parties moved for summary judgment on the pleadings and agreed statements of facts. (R. 27–30.) The District Court on May 14, 1946, held that the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679, controlled the case, and entered a summary judgment in favor of the taxpayer (R. 36–40, 41), and the Circuit Court of Appeals affirmed. (R. 46.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that claims for refunds of erroneous assessments of income taxes are governed by the limitation provisions of Section 3313 of the Internal Revenue Code.

2. In holding that Section 322 (b) of the Internal Revenue Code is not applicable to erroneous assessments of income taxes.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

This is a companion case to *Jones* v. *Liberty Glass Co.*, in which a petition for certiorari is being filed simultaneously with the petition in the instant case. The statutory period of limitations involved in this case is the same as that in issue in the *Liberty Glass* case. All of the reasons for

granting the writ relied upon in our petition in the latter case are equally applicable here.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

APRIL 1947.

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